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SHILASHSHREE SHIRLEY GOMEZ v. RAYMOND SHILENDRAN SIMON

COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
AZIMAH OMAR JCA
B WONG KIAN KHEONG JCA
[CIVIL APPEAL NO: B-02(IM)-780-05-2023]
5 AUGUST 2024

C **Abstract** – *When a petitioner has obtained a maintenance order against a person liable to make payments under the maintenance order from a court competent to make a maintenance order, ('Family High Court') and if the person liable is subsequently adjudged a bankrupt under the Insolvency Act 1967 ('IA'), the petitioner is not required by s. 8(1)(a) of the IA to obtain leave of the Bankruptcy High Court before the petitioner can apply to the Family High Court against the person liable for an 'attachment of earnings order' (defined in s. 3 of the Married Women and Children (Enforcement of Maintenance) Act 1968 ('MWCA') as an order made under s. 4 of the MWCA). The words 'Notwithstanding any written law to the contrary' in s. 4(1) of the MWCA, clearly confer primacy of s. 4(1) over all other written laws (with the exception of the Federal Constitution and the Courts of Judicature Act 1964).*

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F ***FAMILY LAW:*** *Maintenance order – Enforcement – Respondent husband ordered to pay monthly maintenance to petitioner wife and children – Respondent subsequently adjudged bankrupt – Petitioner filed application in Family High Court to attach earnings of respondent husband under s. 4(1) of Married Women and Children (Enforcement of Maintenance) Act 1968 ('MWCA') – Whether petitioner required by s. 8(1)(a) of Insolvency Act 1967 to obtain leave of Bankruptcy High Court – Married Women and Children (Enforcement of Maintenance) Act 1968, s. 3*

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WORDS & PHRASES: *'Notwithstanding any written law to the contrary' – Married Women and Children (Enforcement of Maintenance) Act 1968, s. 4(1) – Whether clearly conferred primacy of s. 4(1) of MWCA over all other written laws, with exception of Federal Constitution and Courts of Judicature Act 1964 – Intention for legislation to prevail*

H

CIVIL PROCEDURE: *Preliminary objection – Proceedings – Whether advocate and solicitor raised preliminary objection without complying with Rules and Rulings of Bar Council – Whether advocate and solicitor liable for disciplinary sanction – Whether advocate and solicitor ought not to raise preliminary objection by ambush – Whether advocate and solicitor estopped from raising preliminary objection*

I

The petitioner was the former wife of the respondent, and they have two children from their marriage. Upon an application by the petitioner, the Family High Court (1) granted a decree of divorce to the petitioner; and (2) ordered the respondent to pay the following sums, among others (a) monthly maintenance of RM1500 to be paid to the petitioner until the petitioner remarries; and (b) monthly maintenance in a sum of RM2000 for the two children until they attain the age of 18 years old or after the completion of their tertiary education. Subsequently, the respondent was adjudged a bankrupt by the Bankruptcy High Court ('bankruptcy order'). With regard to the respondent's bankruptcy, the petitioner filed with the Director General of Insolvency ('DGI') a proof of debt for a total of RM136, 448.19 ('POD'). The POD concerned maintenance of the petitioner and the two children which had not been paid by the respondent pursuant to the maintenance order. Premised on the maintenance order, the petitioner filed an application in the Family High Court to attach the earnings of the respondent under s. 4(1) of the Married Women and Children (Enforcement of Maintenance) Act 1968 ('MWCA'). The respondent obtained the DGI's sanction to oppose the petitioner's application. When the petitioner's application was first heard by the High Court Judge ('HCJ'), both counsels for the respondent and DGI raised a preliminary objection ('PO') that the petitioner was required by s. 8(1)(a) of the Insolvency Act 1967 ('IA') to obtain leave of the Bankruptcy High Court before the petitioner could lawfully file the petitioner's application. After hearing the oral submissions by all the parties, the Family High Court upheld the PO and struck out the petitioner's application without any order as to costs ('Family High Court's decision'). Hence, the petitioner filed an appeal to the Court of Appeal against the Family High Court's decision. The issues that arose were (i) whether the respondent could raise the PO without any notice; (ii) whether leave of the Bankruptcy High Court under s. 8(1)(a) of the IA was required for attachment of bankrupt's earnings pursuant to s. 4(1) of the MWCA.

Held (allowing appeal)
Per Wong Kian Kheong delivering the judgment of the court:

(1) The respondent's counsel, a practicing advocate and solicitor, is bound to comply with the Rules and Rulings of the Bar Council ('BC's Rulings'). Any advocate and solicitor who breaches any one of the BC's Rulings may be liable for disciplinary sanction by the Disciplinary Board under s. 94(1),(2) and (3)(k) of the Legal Profession Act 1976 ('LPA'). When an advocate and solicitor raises a PO without complying with Ruling 11.04 of the BC's Rulings, the advocate and solicitor is estopped from raising the PO. The importance of all advocates and solicitors to comply with Ruling 11.04 BC's Rulings ought to be

reiterated. If otherwise, an advocate and solicitor may raise a 'PO by ambush' and catch his or her learned friend by surprise. Hearings by ambush are an anathema to justice. (paras 15-17)

(2) Section 4(1) of the MWCA applies to a 'maintenance order' which is defined very widely in s. 3(a) to (d) of the MWCA. When a party (X) has obtained a maintenance order against a defendant (defined in s. 3 of the MWCA as a 'person liable to make payments under the maintenance order') from a court competent to make a maintenance order and if the defendant is subsequently adjudged a bankrupt under the IA, X is not required by s. 8(1)(a) of the IA to obtain leave of the Bankruptcy High Court before X could apply to the Family High Court against the defendant for an 'attachment of earnings order'. Section 3 of the MWCA has given a wide definition of 'earnings'. (paras 19 & 20)

(3) Parliament has expressly provided for the opening words 'Notwithstanding any written law to the contrary' in s. 4(1) of the MWCA. These express words clearly confer primacy of s. 4(1) of the MWCA over all other written laws (with the exception of the Federal Constitution ('FC') and Courts of Judicature Act 1964 ('CJA')). When the Legislature employs the term 'notwithstanding' in a particular legislation, this indicates the intention of the Legislature for that legislation to prevail over all other written laws (except for FC and CJA). (para 20)

(4) Section 8 of the IA has been amended by Parliament by way of the Bankruptcy (Amendment) Act 2017 ('Bankruptcy Amendment Act'). Consequently, when the said Bankruptcy Amendment Act was passed, Parliament was deemed to know the primacy of s. 4(1) of the MWCA. If the Legislature had intended to repeal the primacy of s. 4(1) of the MWCA, the Legislature would have expressly done so when the said Bankruptcy Amendment Act was passed. Parliament did not do so. In other words, the Legislature had clearly intended for the primacy of s. 4(1) of the MWCA to be still enforceable today. The HCJ failed to consider the primacy of s. 4(1) of the MWCA. There was nothing in s. 40(1) to (3) of the IA, s. 86(1) and (3) of the Law Reform (Marriage and Divorce) Act 1976 which nullified the primacy of s. 4(1) of the MWCA. The HCJ had committed some legal errors, and thus the Family High Court's decision was set aside. (paras 20-23)

Case(s) referred to:

Firdaus Khan Parit Khan & Anor v. CIMB Bank Bhd [2024] 8 CLJ 399 CA ***(refd)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 CA ***(refd)***

MKP Builders Sdn Bhd v. PC Geotechnic Sdn Bhd [2021] CLJU 921; [2021] 1 LNS 921 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 70
Insolvency Act 1967, ss. 2, 8(1)(a), 40(1), (2), (3)
Law Reform (Marriage and Divorce) Act 1976, s. 86(1), (3)
Legal Profession Act 1976, s. 94(1), (2), (3)(k)
Married Women and Children (Enforcement of Maintenance) Act 1968, ss. 3(a), (b), (c), (d), 4(1)
Rules of the Court of Appeal 1994, rr. 54, 96

For the appellant - Derek Tan & Roopini Ramasamy; M/s BC Tan & Co
For the respondent - Marian Nisha Supaya & Elena Ruran Adolfo Libut; M/s Yuvanes Marian Partnership

[Editor's note: For the High Court judgment, please see Shilashshree Shirely Gomez v. Raymond Shilendran Simon [2019] CLJU 1977; [2019] 1 LNS 1977 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Wong Kian Kheong JCA:

Novel issue

[1] This judgment discusses a novel question of whether a person (X) can apply to the Family High Court to attach the earnings of X's former spouse (Y) under s. 4(1) of the Married Women and Children (Enforcement of Maintenance) Act 1968 (MWCA):

(i) when:

(a) X has obtained a maintenance order from the Family High Court for Y to pay monthly maintenance for X and the children from X's marriage with Y; and

(b) Y has been subsequently adjudged a bankrupt under the Insolvency Act 1967 (IA); and

(ii) without obtaining leave of the Bankruptcy High Court pursuant to s. 8(1)(a) of the IA.

[2] At the time of the preparation of the draft of this judgment (draft), the learned Chairperson of this panel, Kamaludin Md Said JCA, has retired. I have forwarded the draft to my learned sister, Azimah Omar JCA who has expressed her concurrence with the draft.

Background

[3] The petitioner (petitioner) was the former wife of the respondent (respondent).

[4] The petitioner and respondent have two children from their marriage (two children).

[5] On 9 October 2019, upon an application by the petitioner, the family High Court:

(i) granted a decree of divorce to the petitioner; and

(ii) ordered the respondent to pay the following sums, among others:

(a) monthly maintenance of RM1,500 to be paid to the petitioner until the petitioner remarries; and

(b) monthly maintenance in a sum of RM2,000 for the two children until the two children attain the age of 18 years old or after the completion of their tertiary education;

(maintenance order).

[6] The respondent was adjudged a bankrupt by the Bankruptcy High Court on 9 February 2022 (bankruptcy order (respondent)).

[7] On 28 June 2022, with regards to the respondent's bankruptcy, the petitioner had filed with the Director General of Insolvency (DGI) a proof of debt for a total sum RM136,448.19 (POD (petitioner)).

[8] The POD (petitioner) concerned maintenance for the petitioner and two children which had not been paid by the respondent pursuant to the maintenance order.

Petitioner's Application To Attach Respondent's Earnings

[9] On 4 July 2022, premised on the maintenance order, the petitioner filed an application in the Family High Court to attach the earnings of the respondent under s. 4(1) of the MWCA (petitioner's application (attachment of respondent's earnings)].

[10] The respondent had obtained the DGI's sanction to oppose the petitioner's application (attachment of respondent's earnings).

[11] On 11 April 2023:

(i) when the petitioner's application (attachment of respondent's earnings) was first heard by the learned High Court Judge (as she then was), both learned counsels for the respondent and DGI raised a preliminary objection (PO) that the petitioner was required by s. 8(1)(a) of the IA to obtain leave of the Bankruptcy High Court before the petitioner could lawfully file the petitioner's application (attachment of respondent's earnings); and

(ii) after hearing oral submission by all the parties, the Family High Court upheld the PO and struck out the petitioner's application (attachment of respondent's earnings) without any order as to costs (Family High Court's decision).

[12] The petitioner has filed an appeal to the Court of Appeal against the Family High Court's decision (this appeal).

Grounds For Family High Court's Decision

[13] The learned High Court Judge's "grounds of judgment" (GOJ) provided the following reasons, among others, for the family High Court's decision:

(i) according to s. 8 of the IA, upon the making of a bankruptcy order, no creditor of the bankrupt shall have any remedy against the bankrupt's property in respect of the bankrupt's "debt provable in bankruptcy" – para. 14 of the GOJ;

(ii) the debt due from the respondent to the petitioner under the maintenance order was a "debt provable in bankruptcy" within the meaning of s. 40(3) of the IA – paras. 15 to 17 of the GOJ. In fact, the POD (petitioner) had been filed with the DGI with regard to the arrears of maintenance due from the respondent to the petitioner under the maintenance order – para. 17 of the GOJ;

(3) section 86(1) of the Law Reform (Marriage and Divorce) Act 1976 (LRA) has expressly provided that arrears of maintenance pursuant to a court order of maintenance is a debt provable in bankruptcy – paras. 18 and 19 of the GOJ; and

(4) based on the above reasons, the petitioner's application (attachment of respondent's earnings) was filed prematurely without leave of the Bankruptcy High Court – paras. 20 and 23 of the GOJ.

Whether Respondent Could Raise PO Without Any Notice

[14] Ruling 11.04 of the "Rules and Rulings of the Bar Council" (BC's Rulings) states as follows:

> 11.04. **Notice of [PO]**
>
> (1) *An Advocate and Solicitor [A&S] shall give written notice to the [A&S] representing all the other parties in the litigation, of his/her intention to raise a [PO] at any hearing before any court*, tribunal or other body.
>
> (2) *Such written notice shall be given to the other [A&S] within a reasonable time before the hearing and in any event not later than 4 clear working days before the hearing, to enable the other [A&S] to properly prepare themselves and to secure instructions from their clients with regard to the proposed [PO]*.

(3) *Such written notice shall set out the following details*:

(a) *the nature of the proposed [PO]*;

(b) *a list of authorities that the [A&S] raising the [PO] intends to rely on; and*

(c) *the proposed relief that the [A&S] raising the [PO] will seek before the court, tribunal or other body*.

(4) *Only in exceptional circumstances may an [A&S] raise a [PO] during the hearing of any matter without giving the written notice required in this Ruling. In such event the [A&S] representing the other parties are entitled to request for an adjournment of the [PO] and the [A&S] raising the [PO] is precluded from objecting to such a request*.

(5) *Nothing in this Ruling shall affect the general discretion of the relevant court, tribunal or other body to deal with [POs], including making orders for costs*.

(emphasis added)

[15] Firstly, DGI's legal officer is not subject to the BC's rulings. However, the respondent's learned counsel, a practising advocate and solicitor, is bound to comply with the BC's rulings. Any A&S who breaches any one of the BC's rulings may be liable for disciplinary sanction by the Disciplinary Board (DB) under s. 94(1), (2) and (3)(k) of the Legal Profession Act 1976 (LPA). We reproduce below the relevant part of s. 94 of the LPA:

Power of [DB] to strike off the Roll, suspend for misconduct, etc.

94(1) *All [A&S] shall be subject for the purposes of all disciplinary actions to the control of the [DB].*

(2) *Any [A&S] who has been guilty of any misconduct shall be liable to be struck off the Roll or suspended from practice for any period not exceeding five years.*

(3) *For the purposes of this Part, "misconduct" means conduct or omission to act in Malaysia or elsewhere by an [A&S] in a professional capacity or otherwise which amounts to grave impropriety and includes:*

...

(k) *the breach of* [LPA] or of any rules made thereunder or *any direction or ruling of the Bar Council*; …

(emphasis added)

[16] When an advocate and solicitor raises a PO without complying with Ruling 11.04 of the BC's Rulings, the advocate and solicitor is estopped from raising the PO. We refer to the following judgment of the High Court in *MKP Builders Sdn Bhd v. PC Geotechnic Sdn Bhd* [2021] CLJU 921; [2021] 1 LNS 921; [2021] 8 AMR 174, at [18(1)]:

[18] *Thirdly, when an A&S (X) does not comply with Ruling 11.04(2) in raising a PO on behalf of X's client (Y):*

(1) *Y is considered to have waived Y's right to raise the PO. I rely on the following judgment of Low Hop Bing J (as he then was) in the HC case of Malaysia Building Society Bhd v. Univein Sdn Bhd* [2002] 2 CLJ 81 (*MBSB's Case)*, at 95 and 96-97:

Preliminary Objections

It is to be noted that in the six or more affidavits filed by the defendant to resist the plaintiff's application herein, the defendant did not advert to any preliminary objection, nor give the plaintiff any notice of the defendant's intention to raise preliminary objections, which only surface now in the submissions presented for the defendant, thereby springing surprises on the plaintiff. In such a situation, part H, para. 19(a), (b) and (c) of the Bar Council Rulings 1997 requires that a written notice be given. …

…

Apart from the aforesaid ruling, our courts have consistently upheld such procedure ie, in giving the other side notice at the earliest moment: per Thomson, CJ in Gurbachan Singh v. Seagrott & Campbell (No. 2) [1962] 28 MLJ 370; per Edgar Joseph Jr, J (later FCJ) in Jasabena Sdn. Bhd. v. Beh Heng Poo & Anor [1985] 1 MLJ 394; per Abdul Kadir Sulaiman J (now JCA) in Datuk Bandar Kuala Lumpur v. Seman bin Amat & 2 Other Cases [1996] 3 CLJ 263.

In Bukit Melita Sdn Bhd v. Lam Geok Hee & 7 Ors [1997] 4 AMR 3160, one of the issues for determination revolves around the effect of the failure by the respondent's solicitor to give written notice of the preliminary objection to the appellant's solicitors. There I held as follows:

> *In my considered view, it is trite law that a party who wishes to raise any preliminary objection must give written notice to the other party's solicitors as early as possible of his intention to do so. Failure to do so would amount to a waiver of the party's right to raise the objection: per Mohd Hishamudin bin Mohd Yunus JC (as he then was) in Public Bank Berhad v. Berjaya Housing Development Sdn Bhd & Ors [1995] 1 CLJ 237, and Edgar Joseph in Jasabena Sdn Bhd v. Beh Heng Poo & Anor* [1985] 1 MLJ 394. *It was held in these two cases that the notice of preliminary objections must satisfy two requirements, viz: (a) the notice must be in writing; and (b) the notice should be given at the earliest possible moment to the other side who otherwise might be taken by surprise. It is obvious that the whole purpose of the notice is to promote good etiquette amongst members of the Bar and more importantly to remove the element of surprise. It is necessary that the party against whom an objection is intended to be raised should not be taken by surprise and that both parties are given equal opportunities to prepare their submissions in order to ventilate all the relevant issues; being forewarned is being forearmed. Although it is true to say that the element of surprise in the instant case is completely non-existent since the parties herein are given adequate equal opportunity and time to prepare their respective written submissions, it must be immediately emphasized that the notice of objection must at all times be given to the other side. There can be no excuse for any delay, intentional or otherwise, in giving notice to the appellant. Since the respondents' learned counsel has failed to give any prior written notice of the*

preliminary objection, I hold that the respondents are deemed to have waived their rights to do so. Waiver implies something in the nature of estoppel (See Wong Chor San v. Chop Yee Kuan [1975] 23 MLJ 68 at p. 70*).*

On the aforesaid authorities, I would have thought that it would have been adequate to dismiss the preliminary objections raised by the defendant's learned counsel.

(emphasis added)

[17] We take this opportunity to reiterate the importance for all advocate and solicitor to comply with Ruling 11.04 of the BC's Rulings. If otherwise, an advocate and solicitor may raise a "PO by ambush" and catch his or her learned friend by surprise. Hearings by ambush are anathema to justice.

Whether Leave Of Bankruptcy High Court Under Section 8(1)(a) IA Is Required For Attachment Of Bankrupt's Earnings Pursuant To Section 4(1) Of The MWCA

[18] We reproduce below ss. 8(1)(a), 40(1) to (3) of the IA, definitions of "earnings" and "maintenance order" in s. 3 MWCA, s. 4 of the MWCA, s. 86(1) and (3) of the LRA:

IA

s 8. **Effect of bankruptcy order**

(1) *On the making of a bankruptcy order:*

(a) *except as provided by this Act, no creditor to whom the bankrupt is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the bankrupt in respect of the debt, or shall proceed with or commence any action or other legal proceeding in respect of such debt unless with the leave of the court and on such terms as the court may impose;*

…

s 40. **Description of debts provable in bankruptcy**

(1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust shall not be provable in bankruptcy.

(2) A person having notice of any act of bankruptcy available against the debtor shall not prove under the bankruptcy order for any debt or liability contracted by the debtor subsequent to the date of his so having notice.

(3) *Save as provided in subsections (1) and (2) all debts and liabilities present or future, certain or contingent, to which the debtor is subject at the date of the bankruptcy order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy order shall be deemed to be debts provable in bankruptcy.*

MWCA

s 3. **Interpretation**

"earnings", in relation to a defendant, means any sums payable to him:

(a) *by way of wages or salary, including any fees, bonus, commission, overtime pay or other emoluments payable in addition to wages or salary by the person paying the wages or salary or payable under a contract of service;*

(b) *by way of pension, including gratuity and an annuity in respect of past services, whether or not the services were rendered to the person paying the annuity, and including periodical payments by way of compensation for the loss, abolition or relinquishment, or any diminution in the emoluments, of any office or employment;*

...

"maintenance order" means:

(a) *an order made under section 3 of the Married Women and Children (Maintenance) Act 1950*;

(b) *an order for the payment of periodical sums by way of maintenance or alimony to a wife or for the benefit of any child under the Law Reform (Marriage and Divorce) Act 1976*;

(c) *a maintenance order confirmed by the court under the Maintenance Orders (Facilities for Enforcement) Act 1949; and*

(d) *where this [MWCA] are made applicable by virtue of an authorization under section 14 to or in respect of a maintenance order made by a Syariah Court shall include such order.*

s 4. **Power of court to make an attachment of earnings order.**

(1) *Notwithstanding any written law to the contrary, the court may, upon application by the person for whose maintenance the order is made or the guardian of such person, make an attachment of earnings order, if the court considers it just so to make.*

(2) *An application for an attachment of earnings order may be made in the proceedings in which a maintenance order is applied for or in any subsequent proceedings.*

s 86 LRA **Recovery of arrears of maintenance**

(1) *Subject to subsection (3), arrears of unsecured maintenance, whether payable by agreement or under an order of court, shall be recoverable as a debt from the defaulter and, where they accrued due before the making of a receiving order against the defaulter, shall be provable in his or her bankruptcy* and, where they accrued due before his or her death, shall be a debt due from his or her estate.

...

(3) *No amount owing as maintenance shall be recoverable in any suit if it accrued due more than three years before the institution of the suit.*

(emphasis added)

[19] Firstly, s. 4(1) of the MWCA applies to a "maintenance order" which is defined very widely in s. 3(a) to (d) of the MWCA (including a maintenance order made by a Syariah Court).

[20] Secondly, we are of the following view:

(i) when a party (X) has obtained a "maintenance order" against a "defendant" (defined in s. 3 of the MWCA as a "person liable to make payments under the maintenance order") from a "court" (according to s. 3 of the MWCA, "a court competent to make a maintenance order" which we have referred to in this judgment as the family High Court); and

(ii) if the defendant is subsequently adjudged a bankrupt under the IA

- X is not required by s. 8(1)(a) of the IA to obtain leave of the Bankruptcy High Court (s. 2 of the IA defines "the court" to mean "the court having jurisdiction in bankruptcy" under IA) before X can apply to the Family High Court against the defendant for an "attachment of earnings order" (defined in s. 3 of the MWCA as an order made under s. 4 of the MWCA). It is to be noted that s. 3 of the MWCA has given a wide definition of "earnings".

The above decision is premised on the following reasons:

(i) our Parliament has expressly provided for the opening words "notwithstanding any written law to the contrary" in s. 4(1) of the MWCA. These express words, in our opinion, clearly confer primacy of s. 4(1) MWCA over all other written laws (with the exception of the Federal Constitution (FC) and the Courts of Judicature Act 1964 (CJA)) (Primacy of s. 4(1) of the MWCA).

When the Legislature employs the term "notwithstanding" in a particular legislation, this indicates the intention of the Legislature for that legislation to prevail over all other written laws (except for FC and CJA). The effect of the word "notwithstanding" in a written law has been explained in the Court of Appeal case of *Firdaus Khan Parit Khan & Anor v. CIMB Bank Bhd* [2024] 8 CLJ 399; [2024] 5 MLRA 108, at [20(1)], as follows:

> [20(1)] *r. 18(7) RCA is subject to r. 18(7A) RCA due to the use of the word "Notwithstanding" employed by the Rules Committee in r. 18(7A) RCA. The effect of the term "notwithstanding" has been explained by Low Hop Bing J (as he then was) in the High Court case of OCBC Bank (M) Bhd v. Tan Eng Kwee [2003] 3 CLJ 161, at 165, as follows*:

The phrase "Notwithstanding sub-s. (2)" in s. 8(2A) [of the then named Bankruptcy Act 1967] means that s. 8(2) is to be disregarded in so far as it is inconsistent with s. 8(2A) so that the provisions of s. 8(2A) shall prevail and play a predominant role to the exclusion of s. 8(2) which has been rendered subservient to s. 8(2A).

(emphasis added)

Section 4(1) of the MWCA cannot override the FC because by virtue of art. 4(1) of the FC, our FC is supreme. Article 4(1) of the FC reads as follows:

Article 4 Supreme law of the Federation

(1) *This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.*

(emphasis added).

According to s. 4 of the CJA, in the event of inconsistencies between CJA and any other written law other than the FC, the provisions of the CJA shall prevail. Hence, s. 4(1) of the MWCA cannot override the CJA; and

(ii) Section 8 of the IA has been amended by Parliament by way of the Bankruptcy (Amendment) Act 2017 (Act A1534). There is a rebuttable presumption that our Legislature is deemed to know existing law – please refer to the judgment of Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520; [1995] 1 MLJ 719, at 754. Consequently, when Act A1534 was passed, Parliament was deemed to know the Primacy of s. 4(1) of the MWCA. If the Legislature had intended repeal the Primacy of s. 4(1) of the MWCA, the Legislature would have expressly done so when Act A1534 was passed. Our Parliament did not however do so. In other words, the Legislature has clearly intended for the Primacy of s. 4(1) of the MWCA to be still enforceable today.

[21] As explained in the above para. 20, the learned High Court Judge had failed to consider the primacy of s. 4(1) of the MWCA (first legal error).

[22] There is nothing in s. 40(1) to (3) of the IA, s. 86(1) and (3) of the LRA which nullifies the primacy of s. 4(1) MWCA. In relying on s. 40(1) to (3) of the IA, s. 86(1) and (3) of the LRA to support the Family High Court's decision, the learned High Court Judge had committed another error of law (second legal error).

[23] In view of the first and second legal errors, we are constrained to allow this appeal.

A **Should Costs Be Awarded In This Case?**

[24] The Court of Appeal has an unfettered discretion under s. 70 of the CJA, rr. 54 and 96 of the Rules of the Court of Appeal 1994 (RCA) to award costs of an appeal as well as costs of the proceedings in the High Court. Reproduced below are s. 70 of the CJA, rr. 54 and 96 of the RCA:

B

s. 70 CJA **Costs of appeal.**

The Court of Appeal may make such order as to the whole or any part of the costs of appeal or in the court below as is just.

RCA

C

r. 54. *Costs to be in the discretion of the Court.*

Subject to the provisions of any other written law and these Rules, the costs of and incidental to all proceedings in the Court shall be in the discretion of the Court.

r. 96. *Costs to be in the discretion of the Court or Judge.*

D

Subject to the provisions of any other written law and these Rules, the costs of and incidental to all proceedings in the Court shall be in the discretion of the Court or Judge:

> Provided that nothing herein contained shall deprive an executor, administrator, trustee, or chargee, who has not unreasonably
E instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the Rules hitherto acted upon.

(emphasis added)

F **[25]** In view of the novelty of the issue in this case, we have decided to exercise our discretion pursuant to s. 70 of the CJA, rr. 54 and 96 of the RCA that no costs shall be ordered for the proceedings in the Family High Court and Court of Appeal.

Conclusion

G **[26]** Premised on the reasons explained in the above paras. 20 to 23, we allow this appeal and make the following order:

(i) the Family High Court's decision is set aside;

(ii) the petitioner's application (attachment of respondent's earnings) shall
H be heard by the Family High Court on its merits; and

(iii) there shall be no order as to costs in the Family High Court and Court of Appeal.

I